

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 DONNA ZIZIAN, Individually and on
12 behalf of all other similarly situated
California Residents

13 Plaintiff,

14 v.

15 MASSAGE ENVY FRANCHISING,
16 LLC, a Delaware Limited Liability
Company,

17 Defendant.

18 MICHELE BANDELL, DAVID
19 EIGLARSH, CHARLENE PANOS,
20 JEANETTE RAWLS, JENNIFER
WALKER, and ALEX ZENNARO,
individually and on behalf of all others
similarly situated,

21 Plaintiffs,

22 v.

23 MASSAGE ENVY FRANCHISING,
24 LLC, a Delaware Limited Liability
Company,

25 Defendant.
26
27
28

Case No. 16-cv-00783-DMS-BGS
Case No. 16-cv-01236-DMS-BGS

**ORDER GRANTING FINAL
APPROVAL OF CLASS
SETTLEMENT AND AWARDED
ATTORNEYS' FEES AND
SERVICE AWARDS**

On July 1, 2016, this COURT entered its Order [Dkt. 21] preliminarily approving the class action settlement set forth in the Class Action Settlement and Release (the “AGREEMENT”) finding that the SETTLEMENT appeared fair, adequate, and reasonable, free of collusion or indicia of unfairness, and within the range of possible judicial approval thereby warranting notice to the class. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the COURT also provisionally certified two CLASSES:

“ACTIVE MEMBERS” defined as members of a clinic or spa independently owned and operated by an MEF FRANCHISEE within the United States whose membership was active as of June 30, 2016, including members whose MEMBERSHIP was frozen or suspended as of June 30, 2016. Excluded are MEF and any person, firm, trust, corporation, or other entity related to or affiliated with MEF, LEGACY MEMBERS,¹ and any member whose membership was terminated for inappropriate or illegal conduct.

“CANCELLED MEMBERS” defined as All members of a clinic or spa independently owned and operated by an MEF FRANCHISEE within the United States who had one or more UNUTILIZED MASSAGES when (i) he/she cancelled his/her MEMBERSHIP; (ii) he/she elected not to renew his/her MEMBERSHIP; or (iii) his/her MEMBERSHIP was terminated for non-payment and such cancellation, termination, or non-renewal occurred between March 7, 2015, and June 30, 2016. Excluded are MEF and any person, firm, trust, corporation, or other entity related to or affiliated with MEF, LEGACY MEMBERS, and any member whose membership was terminated for inappropriate or illegal conduct.

Currently pending before the COURT is the Motion for Final Approval of the Class Action Settlement and Entry of Final Judgment [Dkt. 25] filed by Class Representatives Donna Zizian (“ACTIVE MEMBER CLASS REPRESENTATIVE”), and Class Representatives Michelle Bandell, David Eiglarsh,

¹ LEGACY MEMBERS refers to those members of a clinic or spa independently owned and operated by an MEF FRANCHISEE within the United States whose Membership Agreements expressly state that accrued monthly massages may be used after membership termination, cancellation, or non-renewal.

Charlene Panos, Jeanette Rawls, Jennifer Walker, and Alex Zennaro (“CANCELLED MEMBER CLASS REPRESENTATIVES”) (collectively, the ACTIVE MEMBER CLASS REPRESENTATIVE and the CANCELLED MEMBER CLASS REPRESENTATIVES are referred to as the “CLASS REPRESENTATIVES”). The CLASS REPRESENTATIVES and Defendant Massage Envy Franchising, LLC (“MEF”) are collectively referred to herein as the “PARTIES.” Also pending before the Court is the ACTIVE MEMBER CLASS REPRESENTATIVE’s Motion for an Award of Attorneys’ Fees, Expenses and Service Award [Dkt. 24] and the CANCELLED MEMBER CLASS REPRESENTATIVES’ Motion for an Award of Attorneys’ Fees, Expenses and Service Awards [Dkt. 23]. Due and adequate notice having been given of the class action SETTLEMENT, the AGREEMENT, and of the FINAL APPROVAL Hearing as required in the PRELIMINARY APPROVAL ORDER [Dkt. 21] and the COURT having considered all papers, including all objections filed, having heard oral argument on January 13, 2017, and otherwise being fully informed and good cause appearing:

IT IS HEREBY ORDERED THAT:

1. This FINAL APPROVAL ORDER incorporates the AGREEMENT, as submitted to the COURT with the Motion for Preliminary Approval of Class Action Settlement, filed June 3, 2016 [Dkt. 17-3]. The capitalized terms used in this Final Approval Order shall have the meanings and/or definitions given to them in the AGREEMENT unless specified herein to the contrary.

2. This COURT has jurisdiction over the subject matter of the ACTIONS and over all CLASS MEMBERS and over those persons and entities undertaking affirmative obligations under the AGREEMENT.

3. The COURT finds that the AGREEMENT is eminently reasonable as it will provide CLASS MEMBERS with substantial and immediate relief and allows

1 CLASS MEMBERS to avoid the risk, expense, complexity, and likely duration of
2 further litigation.

3 4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the COURT
4 hereby certifies for settlement purposes only the SETTLEMENT CLASS, which is
5 comprised of all CLASS MEMBERS except (i) those 91 individuals identified on
6 **Exhibit 1** hereto, who properly excluded themselves by submitting a timely request
7 for exclusion in accordance with the requirements set forth in the AGREEMENT and
8 CLASS NOTICE; and (ii) any judge, justice, judicial officer, or judicial staff of the
9 COURT.

10 5. The Court finds on the record before it that the SETTLEMENT CLASS
11 satisfies the requirements for class certification under Federal Rules of Civil Procedure
12 23(a) and 23(b)(3), for settlement purposes only, because (a) the SETTLEMENT
13 CLASS MEMBERS are so numerous that joinder of all members is impracticable; (b)
14 there are questions of law and fact common to the SETTLEMENT CLASS
15 MEMBERS; (c) the CLASS REPRESENTATIVES' claims are typical of the claims
16 of the SETTLEMENT CLASS and the CLASS REPRESENTATIVES and CLASS
17 COUNSEL have adequately represented and will continue to adequately represent and
18 protect the interests of the SETTLEMENT CLASS MEMBERS; and (d) class-wide
19 treatment of the disputes raised in the ACTIONS is superior to other available methods
20 for adjudicating the controversies before this COURT at this time. Manageability
21 issues do not prevent certification for settlement purposes because there will be no
22 trial.

23 6. The COURT hereby finds that the individual direct CLASS NOTICE
24 given to CLASS MEMBERS (i) fairly and accurately described these lawsuits and the
25 proposed SETTLEMENT; (ii) provided sufficient information so that CLASS
26 MEMBERS were able to decide whether to accept the benefits offered by the
27 SETTLEMENT, exclude themselves from the SETTLEMENT, or object to the
28

1 SETTLEMENT; (iii) adequately described the manner in which CLASS MEMBERS
 2 could submit a REINSTATEMENT REQUEST and ELECTION OF BENEFIT
 3 FORM, exclude themselves from or object to the SETTLEMENT, and/or appear at the
 4 FINAL APPROVAL HEARING; and (iv) provided the date, time, and place of the
 5 FINAL APPROVAL HEARING. The COURT hereby finds that the CLASS NOTICE
 6 was the best notice practicable under the circumstances and complied fully with
 7 Federal Rule of Civil Procedure Rule 23, due process, and all other applicable laws.

8 7. The COURT hereby finds there were very few timely written objections
 9 and requests for exclusion from the SETTLEMENT. The small number of requests
 10 for exclusion and objections indicates that the vast majority of the CLASS MEMBERS
 11 and the SETTLEMENT CLASS found the SETTLEMENT and the AGREEMENT to
 12 be fair, reasonable, and adequate. Furthermore, the PARTIES demonstrated that none
 13 of the asserted bases for objection are valid and accordingly any and all objections to
 14 the SETTLEMENT and the AGREEMENT are hereby overruled.

15 a. The COURT overrules the objections that the AGREEMENT is
 16 unfair or otherwise inadequate because it does not accommodate each SETTLEMENT
 17 CLASS MEMBER's individual circumstances. *Lane v. Facebook*, 696 F.3d 811, 818-
 18 19, 824 (9th Cir. 2012); *Dauphin Island Prop. Owners Ass'n v. United States*, 90 Fed.
 19 Cl. 95, 107 (2009). Equally important, each of the Objectors could have opted out of
 20 the SETTLEMENT but chose not to do so. *See Lane*, 696 F.3d at 824.

21 b. The COURT overrules the objections filed by the following
 22 Settlement Class Members: Carey Thornhill, Brian R. Klein, Maria Santi, and Fred
 23 DaVeiga. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 323-24 (3d Cir. 2011) ("The
 24 reasonableness of a proposed settlement is assessed by comparing the present value of
 25 the damages plaintiffs would likely recover if successful [at trial], appropriately
 26 discounted for the risk of not prevailing . . . with the amount of the proposed
 27 settlement.") (internal quotation marks omitted).
 28

1 c. The COURT overrules the objections of Alden Paye, Fred
2 DaVeiga (the 60-day time frame is too short to use unused massages), (active members
3 can utilize unused massages only at their home clinic), and Jordan Thomas (no specific
4 objection identified) regarding the conditions placed on utilizing massage services in
5 the AGREEMENT. The fact that the SETTLEMENT does not account for every
6 single SETTLEMENT CLASS MEMBER's unique circumstances does not render the
7 SETTLEMENT unfair: "[T]hat is the nature of a settlement," and the parties'
8 compromise is fair, reasonable, and adequate—particularly when the "serious legal
9 questions that placed the litigation's outcome in doubt [are compared with] the value
10 of the immediate recovery provided." *Tennille v. W. Union Co.*, 785 F.3d 422, 435-
11 36 (10th Cir. 2015); *see also Lane*, 696 F.3d at 824 (some individual settlement class
12 members "will always claim differing amounts of damages," but the presence of class
13 members who may have recovered more individually at trial "does not in itself render
14 the settlement unfair or the . . . recovery among all class members too low.").

15 d. The COURT overrules all other objections raised as they are mere
16 conjecture, inherently flawed, lack sufficient analysis to invalidate the
17 SETTLEMENT, and do not outweigh the clear benefits provided in the
18 SETTLEMENT to the SETTLEMENT CLASS. *In re Lorazepam & Clorazepate*
19 *Antitrust Litig.*, 205 F.R.D. 369, 378 (D.D.C. 2002) (rejecting unsupported objections
20 because they are "of little aid to the Court"); *Hanlon*, 150 F.3d at 1027 (question on
21 final approval is not whether the Settlement "could be prettier, smarter, or snazzier,"
22 but solely "whether it is fair, adequate, and free from collusion").

23 8. The COURT further finds that a full and fair opportunity has been
24 afforded to the SETTLEMENT CLASS to opt out of and to object to the
25 SETTLEMENT and to participate in the hearing convened to determine whether the
26 SETTLEMENT should be given final approval. Accordingly, the COURT hereby
27
28

1 determines that all members of the SETTLEMENT CLASS are bound by this FINAL
2 APPROVAL ORDER.

3 9. The COURT hereby finds that the SETTLEMENT set forth in the
4 AGREEMENT is in all respects fair, reasonable, and adequate and in the best interests
5 of the SETTLEMENT CLASS. In addition, the Court finds that there was no collusion
6 in connection with the SETTLEMENT, that the SETTLEMENT was the product of
7 informed and arm's length negotiations among competent counsel, and that the record
8 is sufficiently developed to have enabled the CLASS REPRESENTATIVES and MEF
9 to adequately evaluate and consider their respective positions. Accordingly, the Court
10 hereby finally and unconditionally approves the SETTLEMENT set forth in the
11 AGREEMENT. The CLASS REPRESENTATIVES and the SETTLEMENT CLASS
12 hereby expressly fully release and forever discharge the RELEASED PARTIES and
13 are hereby permanently barred and enjoined from commencing, pursuing,
14 maintaining, enforcing, or prosecuting against the RELEASED PARTIES, either
15 directly or indirectly, on their own behalf, or on behalf of any class or other person or
16 entity, in any action, regulatory action, arbitration, or court or other proceeding of any
17 kind asserting causes of action, claims, damages, equitable, legal, and administrative
18 relief, interest, demands, rights, or remedies, including, without limitation, claims for
19 injunctive relief, declaratory relief, damages, mental anguish, unpaid costs, penalties,
20 liquidated damages, punitive damages, interest, attorneys' fees, litigation costs,
21 restitution, disgorgement, or equitable relief against the RELEASED PARTIES,
22 whether based on federal, state, or local law, statute, ordinance, regulation, the
23 Constitution, contract, common law, or any other source, that relate to the RELEASED
24 CLAIMS as set forth in the AGREEMENT. This permanent bar and injunction shall
25 not apply to the claims of any CLASS MEMBER who timely and validly requested to
26 be excluded from the SETTLEMENT. This permanent bar and injunction is necessary
27 to protect and effectuate the SETTLEMENT, this FINAL APPROVAL Order, and this
28

1 COURT's authority to effectuate the SETTLEMENT, and is ordered in aid of this
2 COURT's jurisdiction and to protect its judgments.

3 10. The CLASS REPRESENTATIVES and the SETTLEMENT CLASS
4 hereby expressly waive and relinquish, to the fullest extent permitted by law, the
5 provisions, rights, and benefits of Section 1542 of the California Civil Code and any
6 and all provisions, rights, and benefits of any similar statute or law of California or of
7 any other jurisdiction as to all known or unknown claims as against the RELEASED
8 PARTIES with respect to the RELEASED CLAIMS.

9 11. The RELEASED PARTIES may file this FINAL APPROVAL ORDER
10 in any other action that may be pending or brought against them in order to support a
11 defense or counterclaim based on principles of res judicata, collateral estoppel, release,
12 good faith settlement, judgment bar or reduction, or any other theory of claim
13 preclusion or issue preclusion or similar defense or counterclaim.

14 12. In its Preliminary Approval Order [Dkt. 21], the COURT appointed and
15 designated The Garden City Group, Inc. to act as the SETTLEMENT
16 ADMINISTRATOR. The Garden City Group, Inc. shall continue to act as the
17 SETTLEMENT ADMINISTRATOR to perform those duties and responsibilities that
18 remain under the AGREEMENT and this FINAL APPROVAL ORDER.

19 13. ACTIVE MEMBER CLASS COUNSEL are hereby awarded the sum of
20 \$405,000.00 in attorneys' fees and reimbursement of expenses, which sum the
21 COURT finds to be fair and reasonable and fairly compensates them for their
22 contributions to the prosecution of the ZIZIAN ACTION and the SETTLEMENT.
23 The payment of attorneys' fees and costs shall be pursuant to the terms of the
24 AGREEMENT.

25 14. CANCELLED MEMBER CLASS COUNSEL are hereby awarded the
26 sum of \$405,000.00 in attorneys' fees and reimbursement of expenses, which sum the
27 COURT finds to be fair and reasonable and fairly compensates them for their
28

1 contributions to the prosecution of the BANDELL ACTION and the SETTLEMENT.
2 The payment of attorneys' fees and costs shall be pursuant to the terms of the
3 AGREEMENT.

4 15. CLASS REPRESENTATIVE Donna Zizian is hereby awarded a
5 SERVICE AWARD in the amount of \$2,000.00, which the COURT finds to be fair
6 and reasonable and in recognition of her efforts in prosecuting the ZIZIAN ACTION
7 and the SETTLEMENT.

8 16. CLASS REPRESENTATIVES Michelle Bandell, David Eiglarsh,
9 Charlene Panos, Jeanette Rawls, Jennifer Walker, and Alex Zennaro are each hereby
10 awarded a SERVICE AWARD in the amount of \$1,000.00, which the COURT finds
11 to be fair and reasonable and in recognition of their efforts in prosecuting the
12 BANDELL ACTION and the SETTLEMENT. Payment of the SERVICE AWARDS
13 shall be pursuant to the terms of the AGREEMENT.

14 17. Within thirty (30) days after the EFFECTIVE DATE of the
15 SETTLEMENT, as defined and in accordance with the AGREEMENT, MEF shall
16 cause UNUTILIZED MESSAGES for each CANCELLED MEMBER who timely
17 submitted a REINSTATEMENT REQUEST in accordance with the instructions set
18 forth in the AGREEMENT and the CLASS NOTICE to be reinstated into the
19 Millennium Central Office Database for redemption at each SETTLEMENT CLASS
20 MEMBER's HOME CLINIC.

21 18. The SETTLEMENT ADMINISTRATOR shall disclose the
22 REINSTATEMENT DATE on the SETTLEMENT WEBSITE within five (5) days
23 after the EFFECTIVE DATE of the SETTLEMENT, as defined and in accordance
24 with the AGREEMENT.

25 19. In compliance with paragraph 8(G) of the AGREEMENT, within forty-
26 five (45) days of an ACTIVE MEMBER's election of the one hundred eighty (180)
27 day period, the Millennium Central Office Database was updated to indicate that the
28

1 ACTIVE MEMBER elected the one hundred eighty (180) day period following
 2 membership termination, cancellation, or nonrenewal to use REDEEMABLE
 3 UNUTILIZED MESSAGES and any new HOME CLINIC the ACTIVE MEMBER
 4 designated on the ELECTION OF BENEFIT FORM.

5 20. In compliance with paragraph 8(A) of the AGREEMENT, for two (2)
 6 years following the EFFECTIVE DATE of the SETTLEMENT, MEF shall make and
 7 keep in place as a system standard the "FreezePlus" program attached as **Exhibit 7** to
 8 the AGREEMENT.

9 21. In compliance with paragraph 8(C) of the AGREEMENT, for two (2)
 10 years following the EFFECTIVE DATE of the SETTLEMENT, MEF shall make and
 11 keep in place as a system standard the quoted provisions of the template Wellness
 12 Agreement, Cancellation Form, and Talking Points that were launched on March 16,
 13 2016.

14 22. Nothing in this FINAL APPROVAL ORDER is intended to prevent MEF
 15 from modifying any system standard or related document (i) during the two (2) year
 16 period described in Paragraphs 20 and 21 of this FINAL APPROVAL ORDER
 17 provided any such modification is not inconsistent with Paragraphs 20 and 21 of this
 18 FINAL APPROVAL ORDER, or (ii) following the expiration of the two (2) year
 19 period described in Paragraphs 20 and 21 of this FINAL APPROVAL ORDER. Nor
 20 shall the fact that MEF may modify any system standard or related document as
 21 allowed in this FINAL APPROVAL ORDER itself constitute a violation of any state
 22 law.

23 23. In the event that the SETTLEMENT does not become effective in
 24 accordance with the terms of the AGREEMENT, then this FINAL APPROVAL
 25 ORDER shall be rendered null and void and be vacated, the AGREEMENT and all
 26 orders entered in connection therewith shall be rendered null and void *ab initio*, and
 27 these ACTIONS shall be reinstated as they existed prior to the making of the
 28

1 AGREEMENT. In that case, all communications, documents, filings, negotiations,
 2 and other actions taken to negotiate and pursue settlement through the AGREEMENT,
 3 including the AGREEMENT itself, shall be considered confidential settlement
 4 communications that cannot be used as evidence for any purposes whatsoever in the
 5 ACTIONS or any proceedings between the PARTIES or in any other action related to
 6 the RELEASED CLAIMS or otherwise involving the PARTIES, any MEF
 7 FRANCHISEE, or any RELEASED PARTY.

8 24. Nothing in this FINAL APPROVAL ORDER or the AGREEMENT shall
 9 be construed as an admission or concession by any Party. The AGREEMENT and
 10 this resulting FINAL APPROVAL ORDER simply represent a compromise of
 11 disputed allegations.

12 25. All PARTIES to the AGREEMENT and CLASS COUNSEL are directed
 13 to carry out their obligations under the AGREEMENT.

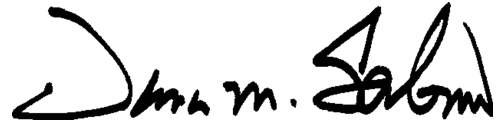
14 26. Without impacting the finality of this FINAL APPROVAL ORDER,
 15 except as otherwise provided in this Paragraph 26, the COURT hereby retains
 16 continuing jurisdiction to assure compliance with all terms of this SETTLEMENT in
 17 accordance with the AGREEMENT and this FINAL APPROVAL ORDER. In the
 18 event any of the RELEASED PARTIES files this FINAL APPROVAL ORDER in
 19 another action pursuant to Paragraph 11 above in order to support a defense or
 20 counterclaim based on principles of res judicata, collateral estoppel, release, good faith
 21 settlement, judgment bar or reduction, or any other theory of claim preclusion or issue
 22 preclusion or similar defense or counterclaim, the court in which the other action is
 23 pending or brought shall have jurisdiction to interpret the AGREEMENT and this
 24 FINAL APPROVAL ORDER to adjudicate such a defense or counterclaim and this
 25 COURT shall have no jurisdiction with respect to such matters.

26 27. CLASS COUNSEL shall serve a copy of this FINAL APPROVAL
 27 ORDER on all named PARTIES and their counsel and the SETTLEMENT
 28

1 ADMINISTRATOR within seven (7) days of receipt and the SETTLEMENT
2 ADMINISTRATOR shall post a copy of this FINAL APPROVAL ORDER on the
3 SETTLEMENT WEBSITE within five (5) days of receipt.

4 **IT IS SO ORDERED**

5 DATED: January 13, 2017



6 The Honorable Dana M. Sabraw
7 United States District Judge